2013 IL App (3d) 110290-U

Order filed November 22, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
	)	Appeal No. 3-11-0290
v.	)	Circuit No. 07-CM-1685
	)	
	)	
RANDY L. CALDWELL,	)	
	)	Honorable
	)	Kathy Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and Carter concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction for resisting a police officer was upheld where no plain error occurred where: (1) police witnesses testified that they responded to a domestic violence dispatch; (2) the prosecution in closing argument opined that police witnesses had no motive to lie; (3) defense counsel did not render ineffective assistance in arguing motions to reopen defendant's testimony or to recess the trial; (4) counsel did not call certain witnesses at trial; (5) the trial court did not *sua sponte* inquire into possible ineffective assistance; and (7) the trial judge did not display a lack of impartiality.

¶ 2 Defendant, Randy L. Caldwell, appeals from an order of the circuit court of Kankakee County entering judgment of conviction following a jury trial on one count of resisting or obstructing a police officer. The court sentenced the defendant to two years domestic violence probation. On appeal, the defendant raises seven issues: (1) whether statements by police witnesses that they were responding to a domestic disturbance call at the defendant's apartment prejudiced the jury and denied his right to a fair trial; (2) whether defendant's right to a fair trial was violated where prosecution statements during closing arguments that the police officers who testified had no motive to lie constituted bolstering of those witnesses's testimony; (3) whether the defendant's counsel was operating under a conflict of interest against the defendant when she argued a motion to re-open evidence; (4) whether defense counsel was ineffective for not calling certain witnesses at trial; (5) whether the trial court was in error in failing to hold a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 1 (1988); (6) whether the trial judge was so openly hostile to the defendant and his defense counsel as to deny his right to a fair trial; and (7) whether the cumulative effect of all the errors asserted herein denied the defendant his right to a fair trial. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The defendant was charged with resisting arrest on March 26, 2007. A public defender was appointed. At trial, the State presented the testimony of three officers of the Bourbonias, Illinois police department:

¶ 5 Officer James Cox testified that he was called to what he described as a "physical domestic" call at an apartment at 210 N. Stadium Drive, Bourbonais, Illinois. Cox testified that, as he drove up to the apartment building he waved to a resident who was taking out his garbage.

That person waived back. He later discovered that the person to whom he waived was the defendant. Cox proceeded to the apartment identified by the dispatcher. He knocked on the door and told a man who came to the door that he was investigating a report of a disturbance at that apartment. The man told Cox that he must have the wrong apartment as there was no disturbance there. While this conversation was going on, the defendant came to the door. Cox testified that the defendant pulled the door nearly shut while keeping his left hand on the doorknob. Cox testified that he then heard a female voice coming from inside the apartment. Cox then asked the defendant if anyone else was in the apartment and the defendant answered "no." Cox told the defendant that he just heard a female voice, at which the defendant admitted that his girlfriend was in the apartment. Cox then told the defendant that he needed to speak with the woman to make sure she was alright. Cox testified that the defendant then became agitated and raised his voice, yelling "fuck you.. she ain't coming out." Officer Cox then testified that it was department procedure to verify that everyone at an apartment of house is not in distress before leaving the site of a domestic disturbance report.

¶ 6 Cox then testified that he requested that the defendant allow him to speak to the woman of he would be arrested for obstructing a police investigation. According to Cox, the defendant then made a movement to pull the door shut at which time Cox stuck his foot in the door to prevent the defendant from closing it. At the same time he put his foot in the door, Cox reach to touch the defendant's hand. Cox testified that the defendant then moved his left hand off the door knob and clinched his right hand into a fist near his thigh and started to cock it back as if to strike toward Cox.

¶ 7 Cox was joined by Officer Henry Bertrand in dragging the defendant away from the door. They told the defendant that he was under arrest for obstructing their investigation and ordered him to the ground. The defendant resisted. Bertrand pull out and displayed his taser, again ordering the defendant to the ground. The defendant continued to resist. Bertrand then fired the taser into the defendant's back. The defendant fell to his knees but continued to resist. Bertrand then fired a second taser shot which allowed the officers to apply handcuffs. Cox testified that during the attempt to subdue the defendant, a woman came out of the apartment holding an infant. He testified that no other people were present outside the apartment when the defendant was subdued. Officer Bertand testified consistent with Cox's testimony. Bertrand stated that they were responding to a "physical domestic" call.

¶ 8 Sergeant Kendregan also testified to the same facts. Specifically, he testified that the dispatcher stated that a 911 caller was walking by the apartment and heard screaming and "thought she was getting beaten up by him." No objection was made to any testimony regarding the domestic violence dispatch.

¶ 9 The defendant testified that his fiancee, Olivia Blanchette, lived at the address to which the officers were called. He was visiting her that morning. He also testified that he had spoken to Blanchette's grandparents that morning in a conversation that "wasn't quite nice." Shortly after that conversation he took the trash out. While doing so, he noticed a police car pass him, so he waived to the officer. The officer waived back. When he returned to the apartment, there was a knock at the door. He did not open the door, but asked who was there. A voice from outside the door stated that it was an officer of the Bourbonnais police department. He asked why they were knocking at his door. The officer explained that they had received an anonymous domestic call

to that apartment. The defendant explained that they must have given the wrong apartment number. When the officer inquired if anyone else was in the apartment, the defendant stated that his girlfriend and their baby were upstairs. The officer asked if he could speak to her, so the defendant called up the stairs for her to come down. She asked if it was necessary since she was breast feeding the baby. The defendant called up that it was necessary because the police wanted to talk to her.

¶ 10 The defendant then testified that Blanchette came down the stairs and talked to Cox. Cox asked her if she was alright, to which she responded that she was. Cox asked her again if she was fine, to which she again replied "yes." The defendant testified that Cox asked her five more times if she was alright. Each time Blanchette said that she was fine, although she became visibly annoyed at the repeated questions.

¶ 11 The defendant then testified that another officer asked him to step out onto the porch, as if he wanted to separate him from Blanchette so Cox could ask her outside the defendant's presence. The defendant testified that as he stepped out onto the porch an officer briefly grabbed the defendant's hand. Cox asked Blanchette again if she was alright, and when she said that she was, the defendant "chuckled" at her response. He testified that he thought it was funny that the police continued to question Blanchette after she repeatedly told them she was fine.

¶ 12 The defendant testified that after he "chuckled," Cox turned around and pushed him to the side of the porch. The other two officers grabbed him from behind, one holding back each arm, and tried to force him to the ground. The defendant asked if he was being arrested, and if so, could they just place the handcuffs on him. All three officers then let go of the defendant and told him to get down on the ground. Two officers then pushed him down. He told them to just

place the cuffs on him. As he was being cuffed, he heard one officer say, "I'm going to tase you." He felt the taser charge hit his back and fell to the ground. He heard Blanchette crying. He also testified that several people were outside and witnessed what happened.

¶ 13 The day after the defendant finished testifying, his counsel sought to recall him to "clarify" his testimony that there were a lot of people outside who witnessed the events surrounding his arrest. The trial judge allowed the defense to present an offer of proof. During the offer of proof, the defendant testified that the resident of a nearby apartment, Brandi Hoffner, told him that she had observed the entire incident and would be willing to testify for him. The defendant further testified that subsequently, Hoffner had become uncooperative and that he was having trouble contacting her. The defendant also testified that other people had offered to testify for him, including a man named "Mitch" whose last name the defendant did not know.

¶ 14 Defense counsel asked the defendant if he and counsel had discussed contacting each of these witnesses prior to trial, but for various reasons, it was decided not to attempt to find these individuals. The defendant answered in the affirmative. Defense counsel then asked the defendant if they had discussed the "strategy" of not calling these people to testify. The defendant agreed. The court denied the motion to allow the defendant to be recalled to testify. The court commented that it appeared that defense counsel was attempting to "hold a *Baltimore* hearing," before a verdict had been rendered.

¶ 15 Defense counsel then moved for a recess so that material witnesses could be located. The trial court denied the motion, pointing out that the case had been pending for approximately three years, and that the court was not going to recess the matter after the jury had begun hearing the case.

¶ 16 In closing argument, the prosecutor argued that the testifying officers were not going to arrest and subdue the defendant because he laughed at them:

> "Are we really going to sit here and believe that those three officers, two officers and a sergeant, decided that day that they were going to risk their jobs, their careers and their reputations because a man, they don't even know, chuckled at them when they were at his residence? It's just not true."

¶ 17 The jury found the defendant guilty of resisting a police officer. The matter proceeded to a sentencing hearing. Blanchette testified that the defendant was the father of her three children and she would have no financial support if he were sent to prison. The evidence established that she received federal low-income housing assistance. The defendant testified that he was not living with Blanchette because he had been banned from the housing complex where she lived. The court inquired about the ban and warned the defendant not to violate the ban in the future.

¶ 18 The court then sentenced the defendant to two years of probation with domestic violence counseling. The defense objected to the domestic violence counseling, pointing out that he had not been convicted of a domestic violence offense. The court overruled the objection, noting that the original call had been for domestic violence, and the court found the presence of domestic violence to be "credible."

¶ 19 The defense filed a motion to reconsider the sentence, again arguing that the domestic violence counseling was not an appropriate condition of probation. The court stated that domestic education classes were appropriate based upon the reasonable inference that domestic violence had occurred. The defense sought to introduce witness testimony to establish that no

domestic violence had occurred that day. The court rejected testimony from three witnesses based upon hearsay and relevancy objections. The defense then called Blanchette to testify that the defendant had not abused her. The judge instructed Blanchette that she could be charged with perjury. The defense then sought to have the defendant testify that he did not abuse Blanchette. The judge indicated that he could only testify after an admonishment of his fifth amendment rights against self-incrimination. The defendant did not testify. The court denied the motion to reconsider the sentence. This appeal followed.

¶ 20 ANALYSIS

¶ 21 1. Domestic Violence Call Evidence

¶ 22 The defendant first claims on appeal that he was denied a fair trial because the jury heard inadmissible hearsay that the police officers had been dispatched to a domestic violence call. He maintains that this evidence should not have been admitted and its admission prejudiced him in the eyes of the jury to the point that he did not receive a fair trial. He acknowledges that he failed to preserve the issue in the trial court, but asks this court to review his claim under the so-called plain error doctrine. The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that will be reviewed *de novo*. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

¶ 23 The plain error doctrine is a limited and narrow exception to the general rule that any allegations of procedural error are forfeited unless they are raised contemporaneously at trial and in a posttrial motion. *People v. Walker*, 232 Ill. 113, 124 (2009). The plain error exception allows a reviewing court to review allegations of error that were not properly preserved for appeal when: (1) a clear and obvious error occurred and the evidence was so closely balanced

that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear and obvious error occurred and that error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process regardless of the closeness of the evidence. *Id.* Under both tests, the burden of persuasion remains with the defendant. *Id.*

¶ 24 The first step in "plain error" analysis is to determine whether an error has, in fact, occurred. It is well settled that if no error occurred, there can be no reversible error. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008). The defendant maintains that the statements made by the testifying officers constituted inadmissible hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement, and it is generally inadmissible unless it falls within an exception to the rule against hearsay. *People v. Caffey*, 205 Ill. 52, 88-89 (2001). Generally, police officers are permitted to testify about statements made to them by others, including police dispatchers, which explain why the officer took certain investigative steps, such as appearing at a defendant's address. *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997). So long as the out of court statements are offered to explain the officer's actions, and not to establish the truth of the matter contained in the statement, those statements are not inadmissible hearsay. *People v. Sundling*, 2012 IL App (2d) 0700455 ¶ 70. Unless the substance of the matter contained in the statement goes to the essence of the charged offense, the testimony is not hearsay. *People v. Cordero*, 244 Ill. App. 3d 390, 392 (1993).

¶ 25 Here, the defendant was not charged with domestic battery, so the substance of the matter contained in the out of court statements did not go to the essence of the charged offense. Moreover, the testimony regarding the dispatch for a possible domestic violence issue explained

the officers' persistence in speaking to Blanchette to ensure that she was not the victim of domestic violence. It also explained to the jury why the police were called to Blanchette's apartment in the first place. The references to domestic violence were not offered to prove that the defendant was engaged in acts of domestic violence, but merely to explain the police presence at the location, there was no hearsay. Since there was no hearsay, there could be no error in admitting the statement and further analysis under the plain error doctrine is not necessary.

¶ 26 2. Closing Argument

¶ 27 The defendant next maintains that his constitutional right to a fair trial was violated when the prosecutor made a statement during closing argument commenting upon the truthfulness of the police witnesses testimony. The defendant acknowledges that he failed to preserve the issue in the trial court, but contends that the issue can be reviewed under the plain error doctrine. We note that the first point of analysis under plain error is whether an error occurred. If we find no error, then the inquiry is at an end. *Hudson*, 228 Ill. 2d at 191. Whether statements made by a prosecutor at closing argument constitute reversible error is subject to *de novo* review. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 28 It is generally improper for a prosecutor to state in closing argument that a testifying officer would risk his career if he testified falsely. See *People v. Adams*, 2012 IL 111168 ¶ 20. Such improper remarks, however, do not warrant reversal a the conviction unless it can be shown that the remarks resulted in substantial prejudice to the defendant or it can be established that the jury might have reached a different verdict had the prosecutor not made the remark. *People v. Flax*, 225 Ill. Ap. 3d 103, 109 (1993). Here, the prosecutor's remarks did not substantially

prejudice the defendant. Although the jury was faced with two very different stories from the officers and the defendant, there is nothing in this record to establish that the jury was swayed by the single comment made by the prosecutor. While it is obvious that the jury had to weigh the relative credibility of the officers as opposed to the defendant, it simply cannot be said that the prosecutor's statement played any role in the jury's deliberation. Simply put, the jury did not have to be reminded that the police officers risk termination of employment if they are caught testifying falsely in a criminal trial. Again, since there was no error, there can be no reversible error under the plain error doctrine.

¶ 29 3. Ineffective Assistance - Hearsay

¶ 30 The defendant next maintains that his trial counsel was ineffective for not raising a hearsay objection to the officers' testimony regarding the domestic violence dispatch. As discussed above, the statements at issue were offered for a non-hearsay purpose, thus a hearsay objection would not have been sustained. Since defense counsel's performance was not deficient, the defendant did not receive ineffective assistance when his counsel did not raise a hearsay objection. See *People v. Albanese*, 104 Ill. 2d 504, 527 (1984) (deficient performance is a prerequisite to ineffective assistance claim).

¶ 31 The defendant further maintains that his defense counsel rendered ineffective assistance by failing to seek a limiting instruction to the jury. He suggests that a limiting instruction that the testimony regarding the domestic violence report was not evidence that he committed domestic violence would have prevented the jury from concluding that he engaged in that conduct. A defendant must show prejudice resulting from the failure to tender a jury instruction in order to establish ineffective assistance of counsel. *People v. Burchette*, 257 Ill. App. 3d 461, 462 (1993).

Here, the defendant has failed to establish prejudice. Assuming, *arrguendo*, that such an instruction was proper, the defendant has failed to show a reasonable probability that had the instruction been given, the result of the proceeding would have been different. *Albanese*, 104 Ill. 2d at 525.

¶ 32 4. Ineffective Assistance - Conflict

¶ 33 The defendant next maintains that he received ineffective assistance of counsel because his defense counsel was operating under a conflict of interest at the time she argued the motion to recall the defendant to give additional testimony and when she argued the motion to continue the trial in an effort to locate additional witnesses. The defendant argues that defense counsel did not effectively argue those motions when she attempted to elicit testimony to defend her effectiveness. A criminal defendant has a constitutional right to conflict free representation. *People v. Morales*, 209 Ill. 2d 340, 345 (2004). The question of whether an attorney labored under a conflict of interest when representing a defendant is a question of law which this court will review *de novo*. *People v. Hernandez*, 231 Ill. 2d 134, 144 (2008).

¶ 34 Here, the record does not support the defendant's contention that his attorney was concerned with her own reputation at the expense of her client. Our review of the record reveals that the defendant suggested several possible witnesses to his police encounter but he did not know their names. It is also apparent from the record that these witnesses may not have actually witnessed the event but repeating statement made by others. The only option available to defense counsel would have been an attempt to get the statements into evidence through the defendant's testimony, or to delay the trial in a futile attempt to locate these witnesses. The trial court noted the fact that well over a year had passed between the events and the trial and that a delay would

not be allowed. Counsel's actions at the hearing on both the motions at issue appear to have been motivated by an effort to explain why those witnesses were at the time not called to testify. The defendant makes much of the comment by the trial judge that defense counsel appeared to be presenting arguments that she had not been ineffective. However, this perception, standing alone, does not prove that defense counsel was acting against the interest of the defendant simply to protect her own reputation.

¶ 35 5. Ineffective Assistance - Failure to Call Witnesses

¶ 36 The defendant next maintains that his defense counsel was ineffective by failing to investigate and call witnesses to testify in support of his version of the events. Whether trial counsel was ineffective under these circumstances is a matter subject to *de novo* review. *People v. Wilson*, 392 Ill. App. 3d 189, 197 (2009). A review of the proposed testimony that forms the basis of the defendant's allegation fails to establish his ineffective assistance claim. As previously discussed, the witnesses the defendant claims should have been called to testify at trial would not have offered material testimony. The witnesses either were not identified by name or their testimony concerned whether there had been a domestic altercation prior to the arrival of the police. In fact, none of the proposed testimony identified by the defendant supported his version of the incident.

¶ 37 6. *Krankel* Hearing

¶ 38 The defendant next maintains that the trial court erred in not holding a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 189 (1984), which requires a trial judge to inquire into a *pro se* claim of ineffectiveness raised by defendant against his counsel. Where the court did not

exercise discretion under *Krankel*, the standard of review is *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003).

¶ 39 Here, the defendant maintains that the trial judge should have *sua sponte* conducted a hearing because his trial counsel's ineffectiveness was readily apparent to the judge. See *People v. Williams*, 224 Ill. App. 3d 517 (1992). In *Williams*, at a hearing on a motion for a new trial, defense counsel presented two witnesses whose testimony completely exonerated the defendant. Counsel gave no explanation as to why those witnesses had not been produced at trial. The appellate court remanded for an inquiry into counsel's ineffectiveness in not calling those two witnesses at trial. *Id*. The facts here are clearly distinguishable. Unlike *Williams*, the witnesses produced at the sentencing hearing did not support the defendant's version of events. Had those witnesses testified at trial there is no basis upon which to conclude that the outcome would have been different.

¶ 40 7. Trial Court Bias

¶ 41 The defendant next maintains that he did not receive a fair trial because the judge was hostile toward him and his defense counsel throughout the proceedings. The defendant acknowledges that he failed to preserve the issue in the trial court, but he contends that this court may review the issue under the plain error doctrine. As stated previously, the initial step in conducting plain error analysis is to determine whether error occurred at all. *Walker*, 232 Ill. 2d at 124.

¶ 42 A trial judge is presumed to be impartial, and the burden of overcoming that presumption rests on the party making the charge of bias. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). Judicial remarks during the course of a trial that are critical of the defendant or counsel, even if

those remarks exhibit a degree of hostility, are insufficient to establish lack of judicial impartiality. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Reviewing the transcript, it is obvious that the judge expressed a degree of impatience with both the defendant and defense counsel, particularly during the hearing on the motion to recall the defendant and the motion to recess the trial. We find nothing, however, to establish that the judge display of displeasure with the way those motions were presented showed a lack of judicial impartiality.

¶ 43 8. Cumulative Error

¶ 44 The defendant lastly maintains that the cumulative effect of the errors at his trial denied him a fair trial. Whether a defendant received a fair trial and due process of law are questions subject to *de novo* review. *People v. Radcliff*, 2011 IL App (1st) 091400 ¶ 22. Having found no error in the proceedings below, we reject this argument without discussion.

¶ 45. CONCLUSION

¶ 46 For the foregoing reasons, the judgment of conviction entered by the circuit court of Kankakee County is affirmed.

¶ 47 Affirmed.